
(2006) 08 CAL CK 0020

In the Calcutta High Court

Case No : A.P.O. No. 282 of 2003 with C.S. No. 2598 of 1969 A.P.O. No. 283 of 2003

Union of India (Commissioner of Customs, Export)

APPELLANT

Vs

Bengal Ruby Mica Supply Co.

RESPONDENT

Date of Decision : 31-08-2006

Acts Referred:

Customs Act, 1962 — Section 14, 27(1)(b)

Citation : (2007) 2 CALLT 6

Hon'ble Judges : Manik Mohan Sarkar, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : N. C. Roy Chowdhury and Mr. A.B. Das, for the Appellant; P.K. Dutta, Mr. Sumon Dutta and Mr. Arindam Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

1. These appeals are directed against a decree dated 2nd March, 1994 passed by Sengupta, J. (as His Lordship then was) and an order dated 5th September, 1999 passed in execution of the decree. The hearing of the suit appears to have been concluded on 7th March 1986. No evidence was taken. The appellant claims to have become aware about the decree only when a demand on that basis was made by a letter dated 19th November 1999 for a sum of Rs.31,39,290.19 together with further interest @ 12% per annum from 11th August, 1999 until realisation. The decree was ultimately put into execution. An order dated 5th September, 2002 was passed in execution of the decree directing the appellant to pay a sum of Rs.33, 17, 063.96. An order attaching properties of the appellant was also passed.

2. The facts of the case briefly stated are as follows:

The plaintiff at the material point of time was engaged in the business of exporting Mica. During the period between 14th October 1966 and 17th February, 1967 the plaintiff exported diverse quantity of Mica from the, Port of

Calcutta to foreign countries, Naturally Customs duty was assessed. In assessing the export duty, the Customs Authority is alleged to have realised an excess sum of Rs. 1,05,745.25 by wrongfully and illegally taking into consideration the cess, payable at the rate of two and half per cent of the value of the Mica exported, as part of the value thereof. In other words cess payable at the rate of two and half percent ad valorem was included in the price of the goods for the purpose of section 14 of the Customs Act and by inclusion of the aforesaid cess in the price of the goods Customs duty was realised on a larger amount. If the price of goods was Rs.100 it became Rs. 102.50 inclusive of cess. Customs duty was assessed on the sum of Rs. 102.50 which according to the plaintiff the Customs Authority had no jurisdiction to do. The Customs authority by illegally inflating the price of the goods realised Rs. 1,05,745.25 in excess than what was legally payable.

3. The plaintiff claims to have been under the impression that the cess was includable in the price of the goods and that is why it did not raise any objection. Sometime in July, 1968 the plaintiff discovered from an order No. 1197-1205/1968 dated 27th May, 1968 passed by the Appellate Collector of Customs, Calcutta that no export duty could be charged or was chargeable on the amount of cess. The plaintiff thereafter claimed refund which was refused on the ground of limitation. The plaintiff has thereafter filed the suit for recovery of the aforesaid sum of Rs. 1,05,745.25. The aforesaid sum is stated to have been realised from the plaintiff in connection with 150 several invoices.

4. The defendant filed a written statement alleging that out of 150 cases claim for refund was made only in respect of 21 bills out of which refund in respect of 12 several bills was allowed and the rest of the claim was rejected because such prayer was made out of time. The rest of the case of the plaintiff has been denied. It has been denied that the recovery was made either illegally or wrongfully.

5. Maintainability of the suit has been challenged. Bar of limitation has also been pleaded. The learned Trial Court appears to have framed three several issues which are as follows:

(a) Whether the suit is maintainable in view of the section 27 of the Customs Act 1962 ?

(b) Whether levy of cess is illegal ?

(c) To what relief the plaintiff is entitled ?

6. All the three issues were answered in favour of the plaintiff by the learned Trial Court. As regards the first issue the learned Trial Court has opined as follows:

The Customs Act is complete code only if the Customs authorities act within the scope of the provisions of the Act but if Customs authority act beyond the scope of the Act then the order of the Customs authorities cannot be treated as final, section 27 is not applicable in a case where the duty is realised unconstitutionally

or illegally or without any authority of law or in excess of power conferred under the statute, or Rules or notification even if the application for refund is time barred under the Customs Act. If there is no machinery for refund of taxes collected in excess of constitutional limits of illegally collected, the suit lies. In the instant case, the collection of export duty on "cess" is patently illegal and beyond the powers conferred on the authorities under the Customs Act, as such the suit lies.

7. As regards the second issue the learned Trial Court held that real value of the goods was their invoice price. It was added that "This position, indeed, was accepted by the customs authorities when they ordered refund of excess duty charged by them in relation to items 22 to 29 and 33-35. Such refund could only have been ordered on the footing that the excess duty on these consignments had been charged without the authority of law and, therefore, without jurisdiction".

8. As regards the third issue the learned Trial Court granted a decree for Rs. 1,05,745.25 together with interim interest and interest on Judgment at the rate of 12% per annum. There was however no claim for any interest in the plaint.

9. Mr. Roy Chowdhury, learned senior Advocate appearing in support of the appeal against the decree submitted that a suit shall not lie for refund or recovery of any duty paid in excess except where the realisation was made pursuant to a statute which has subsequently been held to be unconstitutional. In support of his submission he relied on the Judgment in the case of Mafatlal, reported in 1989 (1997) ELT 247. He drew attention to page 327 wherein Their Lordships summarised view taken by them. It would be appropriate to notice relevant portion of the aforesaid Judgment which reads follows:

The discussion in the Judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the Judgment.

(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff-whether before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991 or thereafter by mis-interpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 and of this Court under Article 32 cannot be circumscribed by the provisions of the said

enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

10. The said enactments including section 11B of Central Excises and Salt Act and section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties, imposed thereunder. Section 11B of the Central Excises and Salt Act and section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under proposition (i) below have to and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact, or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ- but to this Court, which is a Civil Court.

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. In *Tilokchand Motichand* and we respectfully agree with it.

11. The second submission advanced by Mr. Roy Chowdhury was that an assessment retains the character of an assessment irrespective of whether it is right or wrong. In support of the submission he relied on a Judgment in the case of *Kamala Mills Ltd. Vs. State of Bombay*, . He drew our attention to paragraph 14 which reads as follows:

"Section 20 protects "assessment made under the Act or rules made thereunder" by appropriate authorities. There can be little doubt that the clause "an assessment made" cannot mean the assessment properly or correctly made. The said clause takes in all assessments made or purported to have been under the

Act. In its plaint, the appellant is undoubtedly calling into question the assessment order made against it, and such a challenge to the assessment order is plainly though erroneous, and though based on an incorrect finding of fact, is, nevertheless, an order of assessment within the meaning of section 20; and section 20, in terms, provides that it will not be called in question in any Civil Court.

12. He submitted that it is the duty of the officials of the Customs department to make assessment of the goods intended to be exported or in fact imported into the country. This duty arises out of section 17 of the Customs Act and in making such assessment if the authority makes any mistake, it cannot be said that the assessment would, in that event, lose the character of an assessment under the act and would become an act without jurisdiction altogether. He added that for all such cases where any mistake has been committed in assessing the duty payable, only procedure left open to the assessee is to make a prayer for refund in accordance with the procedure laid down in the Act. A suit in that regard is specifically barred as would appear from the case of Mafatlal which he has already cited. He submitted that the learned Trial Court fell into an error in proceeding the basis that the realisation of a sum of Rs. 1,05,745.25 was without jurisdiction and, therefore, a suit was maintainable for recovery thereof.

13. He drew our attention to the decree in order to show that the learned Trial Court has granted 12 per cent interest for the period during which the suit was pending and 12 per cent interest after the decree whereas in the plaint there is no claim for any interest. He submitted that prior to 1995, the Customs Authority did not charge any interest for any delayed payment on duty because there was no provision for any interest being realised. Similarly, there was no provision in the Customs Act for grant of interest together with refund, if any. For the first time provisions were included in the Customs Act both for the purpose of realisation and for payment of interest in the year 1995. He drew our attention to section 27A, which was introduced with effect from 26th May, 1995 by which provision has been made for grant of interest at the rate indicated therein if the refund has not been made within a period of three months from the date of receipt of application under sub-section (1) of section 27 of the Customs Act.

14. He, therefore, submitted that the decree is altogether and should be set aside.

15. Mr. Dutt, learned senior advocate appearing for the plaintiff/ respondent submitted that excess recovery made by the Customs Authority was clearly illegal and an act without jurisdiction. Section 14 of the Customs Act permits duty to be levied only on the price of the goods at which they are offered for sale.

16. In this case, Customs Authority deliberately added thereto the cess and charged customs duty on the cess added value of the goods and, therefore, the assessment was clearly an act without jurisdiction. Therefore, the Judgment rendered by the Trial Court should not be interfered with. In support of his

submission, he relied on a portion of the Judgment in the case of Mafatlal itself. He drew our attention to paragraph 3 of the Judgment in the case of Mafatlal Industries Limited wherein Ahmadi, C.J. (as His Lordship then was) held as follows:

3. In view of these propositions, which have been reiterated by this Court on several occasions and thus constitute sound law, it is clear that actions by way of suits or petitions under Article 226 of the Constitution cannot be completely eliminated. The claims for refund can arise under three broad classes and the issue ouster of jurisdiction of Civil Court can be understood by focussing on the parameters of these classes which are as follows:

Class I : Unconstitutional levy: where claims for refund are founded on the ground that the provision of the Excise Act under which the tax was levied is unconstitutional.

Cases falling within this class are clearly outside the ambit of the Excise Act. In such cases assesseees can either file a suit u/s 72 of the Contract Act, 1872 (hereinafter called "Contract Act") or invoke the writ jurisdiction of the High Court under Article of the Constitution.

Class II : "Illegal levy" - where claims for refund are founded on the ground that there misinterpretation/misapplication/erroneous interpretation of the Excise Act and the Rules framed thereunder. Ordinarily, all such claims must be preferred under the provisions of the Excise Act and the Rules framed thereunder by strictly adhering to the stipulated procedure. However, in cases where the authorities under the Excise Act arrogate to themselves jurisdiction even in cases where there is clear want of jurisdiction, the situation poses some difficulty. Reddy, J. has held that in all cases, except where unconstitutionality is alleged, the remedy is to be pursued within the framework of the Excise Act. This is a dangerous proposition for it will not cater to situations where the authorities under the Excise Act assume authority in cases where there is an inherent lack of jurisdiction. This is because if one were to follow Reddy, J's reasoning, the authorities under the Act will have the final say over situations in which they totally lack inherent jurisdiction. In such a situation, there nothing to prevent the authorities exercising jurisdiction in cases which are ultra vires the Excise Act but intra vires Constitution. To that extent, I would hold that in cases where the authorities under the Excise Act initiate action though lacking in inherent jurisdiction, the remedy by way of a suit u/s 72 of the Contract Act or, a writ under Article 226 of the Constitution, will lie. Such a conclusion will not frustrate the exclusion of jurisdiction of Civil Courts by the Excise Act because the areas where an authority acting under a statute is said to lack inherent jurisdiction have been clearly demarcated by several decisions of this Court.

Class III : "Mistake of Law" - where claims for refund are initiated on the basis of a decision rendered in favour of another assessee holding the levy to be : (1) unconstitutional: or (2) inherent jurisdiction.

17. Mr. Dutt submitted that there is nothing wrong in granting interest in spite of their being no specific prayer for the same. He relied on Order VII, Rule 7 of the CPC which provides that it is not necessary for the plaintiff to ask for general or other relief which may always be given by the Court. Order VII, Rule 7 of the CPC reads as follows:

7. Relief to be specifically stated- every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

18. He then drew our attention to section 34 of the Code of Civil Procedure, wherein a discretion has been vested in the Court for grant of interim interest and interest on Judgment as also pre-suit interest and he submitted that Court is entitled in a just case to grant interest for all the three stages.

19. He also relied in support of his submission that interest is payable in spite of there being no specific prayer for that on a Full Bench Judgment in the case of State of Punjab Vs. Ajit Singh and Others, . He drew our attention to paragraphs 16, 17 and 19 wherein after interpreting the provisions of section 34 of the Code and the provisions contained in Order VII, Rule 7 of the Code of Civil Procedure, the Full Bench came to a conclusion that the award of interest by the District Judge subsequent to the institution of the suit was permissible.

20. He submitted that the defendant has admitted in his written statement that the prayer for refund in so far as they were made within six months from the date of payment were allowed. It is, therefore, an admission of the fact that the claim made by the plaintiff was just and lawful. Only defence of the defendant is that such claim was not made within the period of limitation. He submitted that if the claim is just and lawful, there is no reason why the same should not be allowed and, therefore, the Trial Court was perfectly justified in passing the decree and this Court shall refrain from interfering with the same.

21. We have considered the rival submissions made by the learned counsel appearing for the parties. We cannot but hold that law is now well settled that a claim for refund has to be made by resorting to the procedure laid down in the Act and not by a suit. This position in law has been made amply clear in a number of Judgments including in the case of Mafatlal Industries Limited, which has already been quoted.

22. It is not possible to hold that the excess recovery made the Customs Authority by proceeding on an erroneous basis as regards the value of the goods was an act without jurisdiction. They did have the jurisdiction to make the assessment. Once that is accepted, the power to make the assessment wrongly has to be conceded to them. Mistakes are likely to happen. Just because a mistake was made in arriving at the value of the goods, it cannot be said that the

entire exercise was without jurisdiction.

23. On the top of that proviso under sub-section (1), Clause (b) of section 27 of the Customs Act provides that before a claim for refund can be maintained, the assessee has to show that the incidence of such duty or interest had not been passed on by him to any other person. In the cases, where an application for refund was made before the Amendment Act of 1991 came into force, sub section (2) of section 27 would apply. Sub-section(2) provides that in those cases where such an application was made prior to 1991 Amendment Act and if the Assistant Commissioner of Customs is satisfied that any part portion of the duty paid by the assessee is refundable, he may make an order that the amount so determined shall be credited to the fund. It is a Welfare Fund, which has been defined under Clause 21 of section 2 of the Customs Act. In the present case, the claim for refund arose prior to 1991. The law as it stands does not contemplate that any excess payment made prior to 1991 should be refunded to the assessee. At the highest the money can be deposited with the Welfare Fund. These provisions were not at all noticed by the learned Trial Court.

24. Therefore, the decree for payment of that part of the amount which was recovered in excess to the plaintiff/respondent is clearly contrary to the provision contained in sub-section (2) of section 27 of the Customs Act. Once we have arrived at the conclusion that the decree is contrary to law any further enquiry into the matter in our view is not required.

25. We may however notice another Judgment of the Apex Court in the case of Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another, in which the question for consideration was whether a pre-amendment claim for refund of duty rejected by the authority and allowed by the High Court was proper. The claim was negatived and the appeal was proper. The claim was negatived and the appeal was allowed. Their Lordships referred to the Judgment in the case of Mafatlal and highlighted the following principle decided therein.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff, alleges and establishes that he has not passed on the burden of the duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or the extent he has not so passed on, as the case may. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the Judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other

reason, it is just and appropriate that that amount is retained by the State i.e. by the people. There is no immorality or impropriety involved such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the States. State represents the people of the country. No one can speak of the people unjustly enriched.

26. This aspect of the matter was totally ignored by the learned Trial Court. As a matter of fact the learned Trial Court remained totally oblivious of the statutory requirement u/s 27 adverted to hereinabove.

27. Lastly the question as regards maintainability of the suit we cannot but observe that paragraph 3 of the Judgment in the case of Mafatlal (supra) relied upon by Mr. Dutta is a minority view. The majority view in this regard is as follows:

The jurisdiction of a Civil Court is expressly barred vide sub section (5) of section 11-B, prior to its amendment in 1991, and sub section (3) of section 11-B, as amended in 1991. It is relevant to notice that the Act provides for more than one appeal against the orders made u/s 11-B/Rule 11. Since 1981, an appeal is provided to this Court also from the orders of the Tribunal. While Tribunal is not a departmental organ, this Court is a Civil Court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11 /section 11-B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Article 265. In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provision, it is not permissible to resort to section 72 of Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, vis., Rule 11 and section 11-B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions of Rule 11/section 11-B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or

section 11-B, as the case may be, in the forums provided by the Act. No suit can be filed refund of duty invoking section 72 of the Contract Act.

28. The appeal is as such allowed and the decree is set aside.

29. Since the decree has been set aside the order passed in execution thereof automatically ceases to be operative. Both the appeals are thus allowed.

There shall be no order as to costs.

Prayer for stay made by Mr. Dutta is considered and rejected.

Xerox certified copy of this dictated order be supplied to the parties, if applied for, as expeditiously as possible upon compliance of all formalities.